

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petitions :
of :
JAMES M. VILLANI, :
OFFICER OF CATARACT LUMBER :
& HOME CENTER, INC. :
for Revision of Determinations or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

In the Matter of the Petitions :
of :
KURT M. VILLANI, :
OFFICER OF CATARACT LUMBER :
& HOME CENTER, INC. :
DETERMINATION :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

In the Matter of the Petitions :
of :
LARRY J. VILLANI, :
OFFICER OF CATARACT LUMBER & :
HOME CENTER, INC. :
for Revision of Determinations or for Refund of :
Sales and Use Taxes under Articles 28 and 29 of :
the Tax Law for the Period September 1, 1983 :
through September 23, 1986. :

Petitioner James M. Villani, Officer of Cataract Lumber & Home Center, Inc., 1696 Jane Drive, Niagara Falls, New York 14304, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period

September 1, 1983 through September 23, 1986 (File No. 804437).

Petitioner Kurt M. Villani, Officer of Cataract Lumber & Home Center, Inc., 50 Islewood, Grand Island, NY 14072, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through September 23, 1986 (File No. 804438).

Petitioner Larry J. Villani, Officer of Cataract Lumber & Home Center, Inc., 8955 Rivershore Drive, Niagara Falls, New York 14304, filed petitions for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period September 1, 1983 through September 23, 1986 (File No. 804439).

A consolidated hearing was commenced before Timothy J. Alston, Administrative Law Judge, at the offices of the Division of Tax Appeals, 462 Washington Street, Buffalo, New York on October 24, 1989 at 1:15 P.M. and continued to conclusion on January 9, 1990 at 9:15 A.M., with all evidence to be submitted by February 22, 1990. Petitioner James M. Villani appeared by Donald L. Summer, Esq. Petitioners Kurt M. Villani and Larry J. Villani appeared by Kushner, Kushner & Roscetti, P.C. (Anthony D. Parone, Esq., of counsel). The Division of Taxation appeared by William F. Collins, Esq. (Deborah J. Dwyer, Esq., of counsel).

ISSUES

I. Whether certain notices of determination dated April 8, 1986 were issued to petitioners in accordance with the provisions of Tax Law § 1147(a)(1), and if not, whether petitions filed in respect of said notices should be deemed timely filed.

II. Whether, regarding certain notices of determination dated December 23, 1986, with respect to which petitions were timely filed on or about March 23, 1987, petitioners timely filed petitions with the Division of Tax Appeals pursuant to Tax Law § 170(3-a)(e) following the issuance of certain conciliation orders, dated November 6, 1987.

FINDINGS OF FACT

Petitions Filed in Connection with April 8, 1986 Notices

On or about March 23, 1987, petitioners, Kurt M. Villani, James M. Villani and Larry J.

Villani, filed petitions with the former Tax Appeals Bureau protesting certain warrants dated September 23, 1986 and filed against petitioners in the Niagara County Clerk's office on September 25, 1986. The petitions indicated petitioners had discovered the warrants upon a review by their representative of the Niagara County Clerk's records.

The September 23, 1986 warrants indicated tax due for the taxable period ended November 30, 1985 in the amount of \$97,364.73, plus penalty and interest from each petitioner individually and as officer of Cataract Lumber & Home Center, Inc. The warrants made reference to assessment numbers S860408003E (Kurt M. Villani), S860408002E (James M. Villani) and S860408001E (Larry J. Villani).

By letter dated March 24, 1987 the former Tax Appeals Bureau advised petitioners' representative that the petitions protesting the September 23, 1986 warrants were untimely since such warrants were filed in respect of notices of determination and demands for payment of sales and use taxes due bearing notice numbers S860408003E, S860408002E and S860408001E, respectively. The letter further advised that the Tax Appeals Bureau's records indicated that said notices were mailed on April 8, 1986, and that therefore the March 23, 1987 petitions were untimely. These notices shall be referred to herein as the April 8, 1986 notices.

By letter dated April 27, 1987, petitioners requested a hearing on the timeliness of their March 23, 1987 petitions and the instant proceeding ensued.

At some point in or about April 1986, the Division of Taxation's Buffalo District Office prepared three notices of determination and demands for payment of sales and use taxes due bearing the following notice numbers and listing the following addressees:

Notice Number
S860408003E

Addressee
Kurt M. Villani, Secretary
Cataract Lumber and Home Center, Inc.
2489 Cayuga Street
Niagara Falls, New York 14304

S860408002E

James M. Villani, Treas.
Cataract Lumber and Home Center, Inc.
1696 Jane Drive
Niagara Falls, New York 14304

S860408001E

Larry J. Villani, Vice-President

Cataract Lumber and Home Center, Inc.
991 Pletcher Road
Youngstown, New York 14092

Typed on each of the aforementioned notices, under the heading "Date of Notice" was the following: "040886". Stamped in the lower right corner of each notice was "Apr 17 1986" and stamped in the upper left corner was "Apr 25 1986". Above the "Apr 25 1986" stamp on each notice was the stamped date of "Apr 10 1986" with a line drawn through the date.

The April 8, 1986 notices assessed tax due of \$122,864.33, plus penalty and interest, for the periods September 1, 1984 through February 28, 1985 and September 1, 1985 through February 28, 1986.

With respect to the April 8, 1986 notice in the name of petitioner Kurt M. Villani, the record herein fails to disclose when said notice was mailed by the Division. The record does establish that the notice was mailed by certified mail, return receipt requested, and addressed to petitioner as set forth in Finding of Fact "5".

Petitioner Kurt M. Villani resided at 2489 Cayuga Street, Niagara Falls, New York in April 1986. The notice dated April 8, 1986 and addressed to this petitioner was actually delivered by the U.S. Postal Service to Robert R. Villani. The return receipt card associated with the April 8, 1986 notice addressed to petitioner Kurt M. Villani bore the signature of Robert R. Villani on the line "Signature-Addressee". Said receipt indicated a date of delivery of "4-18-86".

Robert R. Villani is Kurt M. Villani's brother.¹ In April 1986, Robert R. Villani, as president of Cataract Lumber and Home Center, Inc., received a notice of determination which was identical as to the amount of tax assessed and periods of assessment as the April 8, 1986 notices bearing the names of petitioners, Kurt M. Villani, Larry J. Villani and James M. Villani.

The reason that the notice addressed to Kurt M. Villani was actually delivered to Robert R. Villani is not established in the record.

¹Robert R. Villani is also the brother of petitioners James M. and Larry J. Villani.

Petitioner Kurt M. Villani did not receive the April 8, 1986 notice bearing his name.

With respect to the notices addressed to petitioners Larry J. Villani and James M. Villani, although the record establishes that such notices were actually mailed, there is insufficient evidence in the record to show the date on which such mailing occurred.

In April 1986, petitioner Larry J. Villani lived at 2135 Roberts Drive, in the Town of Niagara, New York. This petitioner lived at this address from approximately June of 1985 through June of 1986.

Petitioner Larry J. Villani lived at 991 Pletcher Road, Youngstown, New York 14092, the address set forth on the April 8, 1986 notice bearing his name, from the late 1970's until about June 1984.

Petitioner James M. Villani has lived at 1696 Jane Drive, Niagara Falls, New York 14304, the address set forth on the April 8, 1986 notice bearing his name, for the past 17 years.

Both petitioners Larry J. Villani and James M. Villani denied receipt of the April 8, 1986 notice of determination.

There is insufficient evidence in the record to find that the Division's Buffalo District Office had a routine procedure for the mailing of notices of determination or whether any such procedure was followed with respect to the three April 8, 1986 notices.

The Division introduced into the record herein a mailing log purporting to show that the April 8, 1986 notices were mailed to petitioners by certified mail, return receipt requested, on April 8, 1986. The mailing log so introduced has no United States Postal Service stamp affixed thereto to show that the notices listed thereon were mailed and the date of such mailing; nor is the mailing log signed by the postmaster.

Petitions Filed in Connection with December 23, 1986 Notices

Also on or about March 23, 1987, petitioners filed petitions protesting notices of determination issued on December 23, 1986 to each petitioner as a responsible officer of "Cataract Home & Lumber Center, Inc." [sic]. These December 23, 1986 notices assessed tax

due of \$134,622.22, plus penalty and interest, for the period September 1, 1983 through September 23, 1986.

The Division conceded that the March 23, 1987 petitions filed in respect of the December 23, 1986 notices were timely filed.

On July 14, 1987, a conciliation conference in the matter of the petitions noted above was conducted by the Bureau of Conciliation and Mediation Services at the offices of the Commissioner of Taxation and Finance, 65 Court Street, Buffalo, New York. Petitioners appeared at said conference by their respective representatives.

Following the conciliation conference, a conciliation order was issued by the conciliation conferee in respect of each of the March 23, 1987 petitions noted in Finding of Fact "20". Each such order denied the respective petitioner's petition and sustained the December 23, 1986 notice issued to that petitioner. The orders were issued on November 6, 1987 and were mailed by certified mail on that date to the respective petitioners and their respective representatives. The orders were issued pursuant to the standard office practice and procedure of the Bureau of Conciliation and Mediation Services for the mailing of conciliation orders.

The order issued to petitioner James M. Villani was mailed, certified mail, on November 6, 1987, to such petitioner and his representative at the following addresses:

James M. Villani
Officer of Cataract Lumber and Home Center, Inc.
1696 Jane Drive
Niagara Falls, NY 14304

Donald L. Summer
Statler Towers, Suite 1300
Buffalo, NY 14202

Petitioner James M. Villani and his representative, Donald L. Summer, Esq., denied receipt of the November 6, 1987 conciliation order issued to James M. Villani.

Neither petitioner Kurt M. Villani nor petitioner Larry J. Villani denied that he received a conciliation order dated November 6, 1987 (as described above in Finding of Fact "23"). By

letter dated November 12, 1987 these petitioners, by their representative Anthony D. Parone, Esq., requested petition forms from the Division of Tax Appeals in order to appeal the November 6, 1987 conciliation orders.

Petitioners Kurt M. Villani and Larry J. Villani contended that the November 6, 1987 conciliation orders were timely petitioned by a letter to the Division of Tax Appeals, dated November 25, 1987, contesting said conciliation orders.

The Division of Taxation introduced into the record herein an unsigned copy of a letter dated November 25, 1987, apparently written for the signature of petitioners' representative, Mr. Parone. Said letter contested the November 6, 1987 conciliation orders issued to petitioners Kurt M. Villani and Larry J. Villani. Mr. Parone testified as to the mailing procedures in his office, specifically that a clerical person would have been designated to take outgoing mail to the post office. No evidence was presented to show that the letter dated November 25, 1987 was, itself, deposited in the mail.

At the request of the Division of Taxation, Mr. Frank A. Landers, an employee of the Division of Tax Appeals, searched the files of petitioners Kurt M. Villani and Larry J. Villani within the Division of Tax Appeals and did not find the November 25, 1987 letter.

CONCLUSIONS OF LAW

A. Tax Law § 1138(a)(1) provides that a notice of determination "shall finally and irrevocably fix the tax" unless a petition for redetermination is filed within 90 days of the "giving of notice of such determination". Provisions for the "giving" of such notice are set forth in Tax Law § 1147(a)(1) which provides as follows:

"Any notice authorized or required under the provisions of this article may be given by mailing the same to the person for whom it is intended in a postpaid envelope addressed to such person at the address given in the last return filed by him pursuant to the provisions of this article or in any application made by him or, if no return has been filed or application made, then to such address as may be obtainable. A notice of determination shall be mailed promptly by registered or certified mail. The mailing of such notice shall be presumptive evidence of the receipt of the same by the person to whom addressed. Any period of time which is determined according to the provisions of this article by the giving of notice shall commence to run from the date of mailing of such notice."

B. As noted, the mailing of a notice pursuant to Tax Law § 1147(a)(1) is presumptive evidence of its receipt by the person to whom it is addressed. However, this presumption of receipt arises only upon presentation of proof by the sender that it has a routine office practice and procedure for mailing the notices which demonstrates that the notices were, in fact, properly addressed and mailed (Matter of T.J. Gulf, Inc. v. New York State Tax Commn., 124 AD2d 314, 508 NYS2d 97).

C. Here, the Division has not shown that it has a routine office practice and procedure for mailing notices of determination. Moreover, the Division has not shown that the April 8, 1986 notices were, in fact, properly addressed and mailed pursuant to the requirements of Tax Law § 1147(a)(1). The only evidence presented as to a routine office practice and procedure was the testimony of an individual employed in the Division's Tax Compliance Unit. This individual was not involved in any way in the process of preparing and mailing statutory notices. This testimony is thus insufficient to establish a routine office practice and procedure for the mailing of statutory notices. As to the mailing log purporting to show that the April 8, 1986 notices were mailed to petitioners by certified mail, return receipt requested, on April 8, 1986, this log has no United States Postal Service stamp affixed thereto to show that the notices listed thereon were mailed, and the date of such mailing; nor is the mailing log signed by the postmaster. The

mailing log thus fails to establish that the notices were in fact, properly addressed and mailed. Moreover, the Division's contention that the notices were mailed on April 8, 1986 is further clouded by the existence of several date stamps on each of the so-called April 8, 1986 notices. These stamps call even further into question the accuracy of the mailing log.

D. Based upon the foregoing it is concluded that the Division has not proved proper mailing of the April 8, 1986 notices.² The time period for the filing of a petition was thus not triggered and petitioners are entitled to a hearing on the merits of their March 23, 1987 petitions filed in respect of the April 8, 1986 notices (see Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517).

E. As to whether petitioners are entitled to a hearing on the merits of their March 23, 1987 petitions filed in respect of the December 23, 1986 notices, it should first be noted that the Division has conceded that such petitions were timely pursuant to Tax Law § 1138(a)(1). The Division contends, however, that petitioners failed to file petitions within 90 days of the issuance of conciliation orders on November 6, 1987 as required under Tax Law § 170.3-a(e).

The Division's contention is rejected. Under the conference/hearing system that existed prior to September 1, 1987 (see Tax Law former § 171[Twenty-first]), petitioners were entitled to a hearing on their petitions by virtue of their timely filing of the March 23, 1987 petitions. The procedural requirements of Tax Law § 170.3-a(e) may not be used to abrogate petitioners' rights to the hearing to which they were entitled by such a timely filing of petitions. (Matter of Cap Equipment Rental Corp. and Vincent Caporaso, as Officer, Tax Appeals Tribunal, March 2, 1989.)

²With respect to petitioners Kurt M. Villani and Larry J. Villani, it should be noted that even if one were to conclude that the Division had shown a routine office procedure for the mailing of notices and had shown that the mailing log was accurate and thereby established a presumption of receipt of the April 8 notices, such a presumption is effectively rebutted (see Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517) by the log itself, which shows that the notice mailed to Kurt M. Villani was delivered to Robert R. Villani and the notice to Larry J. Villani was returned unclaimed.

F. The petitions of Kurt M. Villani, Larry J. Villani, and James M. Villani in respect of notices of determination and demands for payment of sales and use taxes due, dated April 8, 1986 and December 23, 1986, are granted to the extent that these matters shall be scheduled for hearings before an administrative law judge on the merits of the petitions.

DATED: Troy, New York

ADMINISTRATIVE LAW JUDGE